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No. 79-54

In the Supreme Court of the United States

OCTOBER TERM, 1978

CITY OF LOS ANGELES, ET AL., PETITIONERS

v.

FANCHON BLAKE, ET AL.

CITY OF LOS ANGELES, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals in *Blake* v. *City of Los Angeles* (Pet. App. 1-37) is reported at

595 F.2d 1367. The opinion of the court of appeals in *United States* v. *City of Los Angeles* (Pet. App. 62-68) is reported at 595 F.2d 1386. The opinion of the district court in *Blake* v. *City of Los Angeles* (Pet. App. 38-61) is reported at 435 F. Supp. 55. The opinion and order of the district court in *United States* v. *City of Los Angeles* (Pet. App. 69-71, 72-73) have not been officially reported.

JURISDICTION

The judgments of the court of appeals in these cases were entered on May 2, 1979. The petition for a writ of certiorari was filed on July 12, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent provisions of the Constitution and federal statutes are reproduced at Pet. App. 74-78.

QUESTIONS PRESENTED

1. Whether a local government violates the Equal Protection Clause by utilizing gender-based job classifications of "policeman" and "policewoman" that limit the duty assignments and promotional opportunities available to women.

2. Whether Congress may constitutionally prohibit state and local governments from engaging in employment practices that have a discriminatory impact on employment opportunities for minorities and women,

without requiring proof that these practices are discriminatory in intent.

3. Whether the court of appeals correctly determined that petitioners had failed to demonstrate that there were no disputed issues of material fact with respect to the claim that their pre-employment minimum height requirement and physical agility test were justified by business necessity.

4. Whether the court of appeals correctly concluded that petitioners failed to show sufficient grounds to enjoin the suspension of federal law enforcement assistance funds pursuant to Section 518 (c)(2)(E) of the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. 3766(c)(2)(E).

STATEMENT

The petition for a writ of certiorari seeks review of the judgments entered in two related cases, *Blake* v. *City of Los Angeles* and *United States* v. *City of Los Angeles*. Although similar questions of law are involved in these two cases, the cases have not been consolidated in the proceedings below. The United States, which is a party in *United States* v. *City of Los Angeles*, submitted a brief as *amicus curiae* in the court of appeals in *Blake* v. *City of Los Angeles*. We therefore address petitioners' contention that the judgments in both cases should be reviewed by this Court.

1. The complaint in *Blake* v. *City of Los Angeles* was filed in 1973. It alleged that, prior to 1973, the Los Angeles Police Department (LAPD) employed

gender-based job classifications that limited the duty assignments and promotional opportunities of women, and thus discriminated against them on the basis of sex, in violation of the Equal Protection Clause and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The complaint further alleged that, when the gender-based classifications were removed in 1973, LAPD instituted a pre-employment minimum height requirement and physical agility test that discriminates against women on the basis of sex, in violation of Title VII.

Plaintiffs moved for injunctive relief and petitioners responded with a motion for summary judgment. Both parties submitted voluminous affidavits and documents in support of their positions. On May 13, 1977, without holding an evidentiary hearing, the district court granted petitioners' motion for summary judgment. The court held that the separate pre-1973 job classifications for "policeman" and "policewoman" did not violate the Equal Protection Clause because petitioners' affidavits and "common sense" show that physical size, strength and agility are apportioned along sexual lines, that these traits are directly related to the ability of an officer to perform the duties assigned to a "policeman," and that the police job classifications based on sex are therefore substantially related to an important governmental objective (Pet. App. 43-45).

The court also held that when Congress enacted the 1972 amendments to Title VII to include coverage for state and local governments (see 42 U.S.C.

2000e(f)), it did not prohibit public employers from utilizing job classifications which have a discriminatory impact unless a discriminatory intent is also proven (Pet. App. 50-53). The court held that the evidence offered in plaintiffs' affidavits and documents did not establish a *prima facie* case of intentional discrimination in this case (Pet. App. 53-54). The court held that, even if a *prima facie* violation of Title VII by a local government could be shown solely by proof that the LAPD pre-employment height and strength tests have a differential impact that excludes more women than men from police employment (see *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977)),[1] plaintiffs' proof was deficient because the City had shown that physical size and strength are appropriate criteria for selecting police officers (Pet. App. 57).

2. The complaint in *United States* v. *City of Los Angeles* was filed in 1977. It alleged that the pre-employment minimum height requirement and physical agility test employed by the LAPD excluded disproportionate numbers of female applicants, and that the written examinations used by the LAPD excluded disproportionate numbers of minority applicants. The United States claimed that these practices constituted unlawful patterns and practices of discrimination in

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[1] Plaintiffs' affidavits showed that the LAPD height requirement (5'6") excluded 87 percent of adult women and only 20 percent of adult men (Pet. App. 10). The physical agility test was failed by 50 percent of the women and 3 percent of the men who took it (*ibid.*).

violation of Title VII, the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1242, and the Omnibus Crime Control and Safe Streets Act of 1968 (Safe Streets Act), 42 U.S.C. 3766(c)(3). The United States agreed to a stay of the portion of its case challenging the sex discriminatory practices of the LAPD pending appellate review of the decision of the district court in *Blake*.

The Safe Streets Act contains a provision that requires the Law Enforcement Assistance Administration (LEAA) to suspend the transfer of federal assistance payments to any state or local government agency whenever the Attorney General brings suit against that agency claiming that it has engaged in a pattern or practice of discrimination. The suspension is mandatory unless "within forty-five days after such filing [either party] has been granted such preliminary relief with regard to the suspension or payment of funds as may be otherwise available by law * * *." 42 U.S.C. 3766(c)(2)(E). Before the forty-five day period expired, petitioners moved the district court to enjoin this suspension of LEAA funding. On July 13, 1977, the district court granted petitioners' motion and enjoined the United States from suspending LEAA funding (Pet. App. 69). The court granted the motion "to maintain the status quo and to prevent irreparable injury" to the LAPD's law enforcement programs (Pet. App. 70). The court also stated that, given its earlier decision in *Blake*, "[i]t does not appear * * * that the [United States'] ultimate success in this case is probable" (*ibid.*).

3. The court of appeals reversed the judgments of the district court.

a. In *Blake*, the court held that when Congress extended the provisions of Title VII to state and local governments in 1972 it intended to subject governmental employers to the same non-discriminatory requirements imposed on private employers. Thus, a *prima facie* case of discrimination against a government employer may be established by a showing that the challenged practice has a discriminatory differential impact even without evidence of discriminatory intent (Pet. App. 6-9). The court held that this construction of Title VII did not conflict with *Washington* v. *Davis*, 426 U.S. 229 (1976) (proof that state employment practices violate the Equal Protection Clause requires a showing of discriminatory intent), because, in enacting legislation under Section 5 of the Fourteenth Amendment, Congress is not limited to prohibiting state action that independently violates the Constitution (Pet. App. 6-7, citing *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966)).

Accordingly, the court held that plaintiffs established a *prima facie* violation of Title VII by their proof that the pre-employment minimum height requirement and physical agility test exclude a disproportionate percentage of female applicants from police employment (Pet. App. 11). The court concluded that the evidence offered by petitioners to show that the LAPD's employment criteria "were so job related as to be justified by business necessity"

(id. at 18) was not sufficient to support summary judgment on this issue.[2]

The court also held that the pre-1973 gender-based job classifications of "policeman" and "policewoman" violated the Equal Protection Clause (Pet. App. 31-35). The court stated that the district court erred in applying "archaic and overbroad generalizations" as an "inaccurate proxy for other, more germane bases of classification" (Pet. App. 34-35, quoting *Craig* v. *Boren*, 429 U.S. 190, 198 (1976)). The fact that men are generally larger and stronger than women thus cannot support a conclusion that all women may be excluded from employment reserved for men only (Pet. App. 34-35).

b. In *United States* v. *City of Los Angeles* the court of appeals reversed the district court's order enjoining the suspension of LEAA funding,[3] holding that petitioners had failed to establish grounds for preliminary injunctive relief. The court stated that

[2] Plaintiffs had pointed out deficiencies in the City's validation studies, which, when viewed alongside federal guidelines for such studies, indicated that the question of business necessity was not appropriate for summary judgment (Pet. App. 27-28). The court also pointed out that the plaintiff had shown that other police departments had successfully removed height requirements with no adverse effects on police department performance.

The court also held that no business necessity had been established for use of the pre-1973 gender-based job classifications of "policeman" and "policewoman" (Pet. App. 16).

[3] The court of appeals also reversed other injunctive relief granted to the City by the district court (see Pet. App. 63-68). Petitioners have not raised these issues in the petition for a writ of certiorari.

petitioners had failed to prove they "would suffer any irreparable injury in the absence of an injunction" (Pet. App. 67) and that the district court had erred in concluding that petitioners' defense would probably succeed on the merits (Pet. App. 66-67). The court of appeals also held that the injunction could not be justified as essential to maintain the "status quo." The purpose of the mandatory suspension provision would be frustrated if suspension could be forestalled in every case merely to maintain the "status quo that the statute was designed to disrupt" (Pet. App. 68).

ARGUMENT

The decisions of the court of appeals are correct and do not conflict with any decision of this Court or the other courts of appeals. Moreover, the decisions are interlocutory and the court of appeals has remanded both cases for additional proceedings in the district court. Further review by this Court at this time is thus not warranted. See *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook Railroad Co.*, 389 U.S. 327 (1967).

1. The court of appeals correctly concluded (Pet. App. 34-35) that the pre-1973 gender-based classifications of "policeman" and "policewoman"—which limited the duty assignments and promotional opportunities of women—were based on outdated and overbroad generalizations about the abilities and proper role of women. Even accepting petitioners' explanation that gender is related to "size, strength, and agility needed to perform police tasks" (Pet. 29),

gender may not be used to weed out applicants for public employment if it is not an accurate "proxy" for the latter, "more germane bases of classification." *Craig* v. *Boren*, *supra*, 429 U.S. at 198. The record assembled in this case refutes any suggestion that women, as a class, are incapable of possessing the traits requisite to effective performance as police officers (Pet. App. 35). The court of appeals thus correctly held that gender-based classification cannot, on this record, be justified by "administrative ease or convenience" in selecting qualified applicants (*ibid.*).

Although the "undisputed facts" (Pet. 35) before the court of appeals supported the conclusion that the gender-based scheme was unconstitutional, the court did not forestall further consideration of the issue on remand. The court reversed the award of summary judgment (Pet. App. 35) and remanded for further proceedings consistent with its opinion (Pet. App. 37). The interlocutory ruling of the court of appeals correctly applied the decisions of this Court and does not warrant further review at this time.

2. The court of appeals also correctly held (Pet. App. 6-9) that Title VII, as amended in 1972, constitutionally proscribes discriminatory employment practices by state and local governments without requiring proof that they are discriminatory in intent. Other courts of appeals have reached the same conclusion [4] and there is no conflict among the circuits to warrant further review.

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[4] See *Scott* v. *City of Anniston*, 597 F.2d 897 (5th Cir. 1979); *United States* v. *City of Chicago*, 573 F.2d 416 (7th Cir. 1978).

The congressional intent to apply "the same Title VII principles * * * to governmental and private employers alike" is clear. *Dothard* v. *Rawlinson*, 433 U.S. 321, 332 n.14 (1977). There is thus no basis for doubting—and petitioners do not dispute—that Congress intended to proscribe employment practices by state and local governments and private employers alike that have a discriminatory, disproportionate impact and did not require proof that challenged practices are discriminatory in intent. See *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431-432 (1971).

Petitioners contend, however, that Title VII is unconstitutional if, as applied to state and local governments, it does not require proof of discriminatory intent (Pet. 26). Although, as petitioners point out (*ibid.*), this Court has held that state action does not deny equal protection in the absence of discriminatory intent (see *Washington* v. *Davis*, *supra*, 426 U.S. at 238-248), in *Katzenbach* v. *Morgan*, *supra*, the Court held that Congress' authority under Section 5 of the Fourteenth Amendment is not limited to prohibiting state action that independently violates the Constitution. 384 U.S. at 648-649.[5] Instead, Congress may enact such legislation as is reasonably appropriate to enforce the prohibitions of the Amendment. *Id.* at 649-650.[6]

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[5] See also *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977); *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 271 (1977).

[6] Petitioners argue (Pet. 26) that this Court's decision in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), indicates that the application of a disproportionate "impact"

In the specific context of employment discrimination and Title VII, congressional findings revealed that extensive discrimination existed in public employment and that many public employment policies extend the unequal results of past official discrimination. S. Rep. No. 92-415, 92d Cong., 1st Sess. 5, 10 (1971); H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 5, 8, 17, 23 (1971). These findings provide a reasonable basis for omitting a requirement that discriminatory intent always be proven (Pet. App. 7-9). The statute aids enforcement of the equal rights mandate of the Amendment by prompting the removal of unjustified employment practices that disproportionally retard minority opportunities.

It would, in any event, be premature for the Court to consider this issue at this time. The case has been remanded for further proceedings in the district court, and the question that petitioners raise now may become moot in the course of these proceedings.

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test to public employment would violate state sovereignty. As the court of appeals recognized (Pet. App. 8), this Court has held that the Fourteenth Amendment abrogated a degree of State sovereignty and authorized Congress to require or prohibit certain state actions to enforce the prohibitions of the Amendment. *Ex Parte Virginia*, 100 U.S. 339, 346 (1879). See also *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 453-456 (1976). *Usery* did not consider legislation passed pursuant to Section 5 of the Fourteenth Amendment, see 426 U.S. at 852, n.17, and any reliance on it in the context of Title VII is therefore misplaced. See also *Firefighters Institute* v. *City of St. Louis*, 549 F.2d 506, 510 n.5 (8th Cir.), cert. denied, 434 U.S. 819 (1977).

3. Petitioners contend (Pet. 18-24) that the court of appeals erred in concluding that material facts remain in dispute on the question whether the LAPD pre-employment minimum height requirement and physical agility tests are justified by "business necessity."[7] But the evidence on which petitioners rely was plainly disputed;[8] and the facts that evidence sought to establish were plainly material (Pet. App. 16-31).[9] The order remanding the case for findings

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[7] Petitioners also claim (Pet. 24-27) that the disproportionate impact of the LAPD pre-employment height and agility requirements is not sufficient to create a *prima facie* case of discrimination. This contention is insubstantial. Employment practices that exclude (1) 87 percent of adult women and only 20 percent of adult men (height requirement) and (2) 50 percent of adult women and only 3 percent of adult men (agility tests) (see note 1, *supra*) plainly evidence "a significantly discriminatory pattern." *Dothard* v. *Rawlinson*, *supra*, 433 U.S. at 329.

[8] Petitioners sought to prove that the LAPD height and agility requirements are justified by business necessity by means of validation studies that "showed that there was some rational relationship between their selection devices and certain elements of job performance by police" (Pet. App. 21). The accuracy of these studies, however, was contested in counter-affidavits filed by the plaintiffs (Pet. App. 23-25). Moreover, plaintiffs "also introduced evidence of contrary findings of other studies" (*id.* at 25). The court of appeals correctly held that "[v]iewing all this evidence in the light most favorable to appellants, appellees failed to establish that the LAPD's height [and agility] requirement[s] [were] so manifestly job related as to be justified by business necessity" (*id.* at 26; see *id.* at 28).

[9] Nothing in the court's decision requires local police departments to alter local procedures in order to maximize the hiring of women, as petitioners contend (Pet. 16-18). In re-

on the disputed issues of fact is thus correct for the reasons amply stated by the court of appeals (*ibid.*).

4. Petitioners argue (Pet. 30-32) that the court of appeals erred in *United States* v. *City of Los Angeles* in reversing the order enjoining LEAA from suspending federal assistance grants to petitioners. 42 U.S.C. 3766(c)(2)(E) provides that, unless either party to a suit filed by the Attorney General claiming a pattern or practice of discrimination obtains preliminary relief within 45 days after the suit is filed, LEAA is to "suspend further payment of any [law enforcement assistance] funds * * * to that specific program or activity alleged * * * to be in violation of [non-discrimination requirements] * * *." The court of appeals correctly held (Pet. App. 64-68) that petitioners failed to establish that preliminary relief is appropriate in this case.

In particular, petitioners have not demonstrated that they will suffer any irreparable injury in the absence of injunctive relief. Petitioners' suggestion (Pet. 32) that an injunction is necessary to avert

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manding this case for findings of fact on the issue of business necessity, the court of appeals simply invoked this Court's holding in *Dothard* v. *Rawlinson, supra,* 433 U.S. at 332 n.14, that "a discriminatory practice must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge" (see Pet. App. 17). If a discriminatory local practice is not "necessary to safe and efficient job performance," it must be changed to comply with Title VII. In any event, by remanding the case for further proceedings, the court did not determine that any LAPD practices are not "necessary to safe and efficient job performance." That is an inquiry for the district court in the first instance.

"unjustifiable hardship on [the] community" represents simply a factual disagreement with the court of appeals. The court of appeals determined that petitioners' affidavits indicate that "the primary effect of a loss of these funds would be the reassignment of certain officers" (Pet. App. 67 n.7) and concluded that this failed to establish irreparable injury (*id.* at 67). Further review of this factual issue is unwarranted.[10]

Moreover, the court of appeals correctly observed that, because the court reversed the judgment in petitioners' favor in *City of Los Angeles* v. *Blake*, petitioners cannot establish that they will probably succeed on the merits (Pet. App. 66-67). Injunctive relief is therefore not available to petitioners in this case. *E.g.*, *Mason County Medical Association* v. *Knebel*, 563 F.2d 256 (6th Cir. 1977); *Missouri Portland Cement Co.* v. *H. K. Porter Co.*, 535 F.2d 388 (8th Cir. 1976); *Clairol Inc.* v. *Gillette Co.*, 389 F.2d 264 (2d Cir. 1968).[11]

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[10] We do not understand petitioners to claim that injunctive relief should be awarded simply to maintain the "status quo" even if irreparable injury would not result in the absence of an injunction (see Pet. 32). 42 U.S.C. 3766(c)(2)(E) requires the suspension of funding unless grounds for preliminary relief are established. See *United States* v. *Virginia*, 569 F.2d 1300 (4th Cir. 1978).

[11] The court of appeals properly rejected petitioners' claim (Pet. 31-32) that the suspension of funding should be enjoined because the suit filed by the United States violates 42 U.S.C. 3766(b) by requesting a "percentage ratio, quota system, or other program to achieve racial balance" (*ibid.*). The United States has alleged that the City has engaged in

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1979

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illegal patterns and practices of discrimination (see 42 U.S.C. 3766(c)(2)(E)). The remedy to be awarded will be based on the need to cure the illegal conduct, not on any desire simply to achieve "racial balance." See Pet. App. 65.

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